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TO USMISSION OECD PARIS

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E.O. 11652: GDS

TAGS: ETRD, OECD

SUBJECT: FEBRUARY 17-21 TCWP MEETING ON GOVERNMENT

PROCUREMENT

1. GUIDANCE FOLLOWS FOR USDEL TO OECD TRADE COMMITTEE WORK-
ING PARTY MEETING TO DISCUSS GOVERNMENT PROCUREMENT ISSUES
ON AGENDA (TFD/TD/825).FOR DISCUSSION OF OTHER ISSUES
RAISED, USDEL SHOULD BE GUIDED BY EARLIER INSTRUCTIONS.
UNLESS OTHERWISE INDICATED, THE MENTION OF PARAGRAPHS BELOW

REFERS TO DRAFT PROCUREMENT CODE (TC(73)15).

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2. (I) DATA COLLECTION. USDEL SHOULD MAKE RENEWED EFFORT

TO OBTAIN MEANINGFUL DATA ON SUPPLY CONTRACT AWARDS OF OECD COUNTRIES TO PROVIDE SUBSTANTIVE BASIS FOR RESOLUTION OUTSTANDING QUESTIONS RELATED TO DRAFT INSTRUMENT. UNLESS DATA DISCUSSION AT MEETING SHOULD DICTATE OTHERWISE, U.S. SHOULD INFORM TCWP THAT U.S. WILL PLACE DATA PROBLEM ON EARLIEST AGENDA OF TRADE COMMITTEE TO OBTAIN STRONGER MANDATE TO OVERRIDE SHORTCOMINGS IN DATA. IN LEADING UP TO THIS STATEMENT, USDEL SHOULD POINT TO LIMITED NUMBER OF COUNTRY RESPONSES AND TO DEFICIENCIES IN REPLIES RELATIVE TO KINDS OF DATA WE HOPED TO OBTAIN FOR PURPOSE ADVANCING WORK ON INSTRUMENT. WE CONSIDER DATA RELEVANT TO DEALING WITH SUCH QUESTIONS AS THRESHOLD VALUE; "BALANCE OF OBLIGATIONS" AMONG SIGNATORIES, ASSESSMENT OF VALUE AND COMPOSITION OF TRADE UNDER GOVERNMENT PURCHASING, AND PRODUCTS WHICH MIGHT BE EXCLUDED FROM INSTRUMENT ON NATIONAL SECURITY GROUNDS.

3. (II-1) NON-DISCRIMINATION AND FINAL PROVISIONS. USDEL SHOULD ENGAGE OTHERS IN FURTHER DISCUSSION, WITHOUT COMMITMENT, OF POSSIBLE SOLUTIONS TO QUESTIONS ON TREATMENT UNDER INSTRUMENT OF OTHER SIGNATORIES, ESPECIALLY WHERE SIGNATORY ALSO BOUND TO OBSERVE EC OR EFTA PROCUREMENT GUIDELINES; TREATMENT OF NON-SIGNATORIES, INCLUDING ACCEPTABILITY CONDITIONAL MFN CONCEPT; AND, AS WARRANTED, TREATMENT OF DEVELOPING COUNTRIES.

4. (II-2) SURVEILLANCE MACHINERY AND SETTLEMENT OF DISPUTES. USDEL SHOULD ADHERE TO U.S. POSITION ON MACHINERY TO OVERSEE IMPLEMENTATION OF INSTRUMENT AND PROCEDURES TO RESOLVE DISPUTES. WE BELIEVE RECOURSE TO THE MULTILATERAL DISPUTE SETTLEMENT PROCEDURE SHOULD BE MADE ONLY AFTER INITIAL ATTEMPTS TO RESOLVE DISPUTES AT BILATERAL LEVEL FAIL. A PANEL SELECTED BY DISPUTANTS RATHER THAN A COMMITTEE OF SIGNATORIES TO INSTRUMENT SHOULD THEN DECIDE ON VALIDITY OF COMPLAINT AND PRESCRIBE REMEDY. WE SHOULD CONTINUE TO URGE REMOVAL OF BRACKETS AROUND PROVISION WHICH CALLS FOR COUNTRY DEFENDING PURCHASE ACTION TO PROVIDE SELECTED CONTRACT AWARDS DATA RELEVANT TO A GIVEN DISPUTE; ACCESS TO RELEVANT FACTS WILL FACILITATE DISPUTES SETTLEMENT (SEE 2(C) IN ANNEX TO TFD/TD/817.) USDEL SHOULD SEEK ADDITION OF CONCEPT OF "AS DETERMINED BY THE PANEL" IN LIMITED OFFICIAL USE

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3B' OF REFERENCED ANNEX TO MAKE CLEAR PANEL WILL DECIDE DEGREE OF IMPAIRMENT OF RIGHTS SUFFERED.

5. (II-3) PROVISIONS FOR PROTEST (PARAGRAPH 34). USDEL SHOULD SUPPORT RETENTION OF LANGUAGE IN BRACKETS. PROVISION CALLS FOR POSSIBILITY OF EXPEDITIOUS REVIEW OF PROTEST BY HIGH GOVERNMENT OFFICIAL OR GOVERNMENT APPEALS BODY SUBSEQUENT TO ITS REJECTION BY CONTRACTING OFFICER,

AND IS INTENDED ALLOW ONE FURTHER EFFORT TO SATISFACTORILY HANDLE PROTESTS BEFORE THE GRIEVANCE TURNS INTO A CONFRONTATION BETWEEN GOVERNMENTS.

6. (II-4) SPECIAL CONDITIONS IMPOSED ON CONTRACT AWARDS (PARAGRAPH 32). USDEL SHOULD SEEK REMOVAL OF CLAUSES IN BRACKETS AT BEGINNING AND END OF PARA 32 ON CONTRACT AWARDS. EXCEPTION FROM PRESCRIBED PROCEDURES FOR CONTRACT AWARDS "IN CASES OF INTERNATIONAL COLLABORATIVE PROJECTS" WOULD FEED INTO HANDS OF COUNTRIES WHICH SEEK TO BUILD UP THEIR TECHNOLOGICAL CAPABILITIES AT EXPENSE OF FOREIGN SUPPLIERS. SECOND CLAUSE ALLOWS FOR USE OF PARTICULAR SUBCONTRACTORS TO PRODUCE ITEMS FOR INCORPORATION IN THE PRODUCT FOR PURCHASE UNDER CERTAIN CONDITIONS. OTHERS COULD ABUSE THIS PROVISION. THE CLAUSE IS REDUNDANT BECAUSE SUCH CONDITIONS ARE NORMALLY INCLUDED IN THE SOLICITATION.

7. (II-5) EXCEPTIONS INTER ALIA FOR INTERNATIONAL ORGANIZATIONS (PARAGRAPH 7). LANGUAGE IN BRACKETS ALLOWS EXCEPTIONS TO PROCEDURES SET OUT IN INSTRUMENT FOR PURCHASES ON BEHALF OF ANOTHER NATIONAL GOVERNMENT OR INTERNATIONAL ORGANIZATION. USDEL SHOULD TAKE POSITION SIGNATORIES TO INSTRUMENT MUST APPLY IT IN THEIR PURCHASING WHENEVER THEY HAVE DISCRETION IN DECIDING METHOD OF PURCHASE. WE WISH TO GUARD AGAINST COUNTRIES ENTERING INTO VARIOUS AGREEMENTS WHICH CALL FOR MUTUAL PURCHASING THAT COULD SIGNIFICANTLY LIMIT SCOPE FOR APPLICATION OF INSTRUMENT. PURCHASES ON BEHALF OF OTHER GOVERNMENTS MAY FALL OUTSIDE SCOPE OF INSTRUMENT, BUT WE SHOULD DEFER FINAL JUDGMENT UNTIL PURCHASING PRACTICES OF CROWN CORPORATIONS ARE CLEARER.

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8. (II-6) USE OF OTHER THAN OPEN OR SELECTIVE PROCEDURES (PARAGRAPH 14). THE REVISED VERSION OF PARA 14 ON USE OF SINGLE TENDERING APPEARS IN ANNEX II OF TFD/TD/812. ON ITEM 1, USDEL SHOULD PROPOSE SUBSTITUTION OF "COLLUSIVE" FOR "IRREGULAR" BID SINCE THE LATTER TERM IS OPEN TO UNINTENDED INTERPRETATIONS. WE MIGHT AGREE TO REMOVE REFERENCE TO "GEOGRAPHICAL" UNDER ITEM 3 IF THE TCWP DISCUSSION SHOULD REVEAL GROUP UNDERSTANDING THAT U.S. PROBLEM IS COVERED BY THE "TECHNICAL" TEST OF EXISTING LANGUAGE. USDEL SHOULD CONTINUE TO PRESS FOR SUBSTANTIAL REVISION OF ITEM 5C SINCE IT IS THE GENERAL PROCUREMENT POLICY OF THE U.S. THAT DESIGN AND DEVELOPMENT IS SEPARABLE FROM FOLLOW-UP PRODUCTION. WE SHOULD ASK EC TO CLARIFY NEED FOR ITEM 7 REGARDING PURCHASES ON COMMODITY MARKETS. USDEL SHOULD OPPOSE RETENTION OF BRACKETED LANGUAGE UNDER ITEM 3

ON NEED FOR SINGLE TENDERING "TO MEET STANDARDIZATION REQUIREMENTS" IF THE U.K. DOES NOT AGREE TO DROP IT, AND DO LIKEWISE FOR ITEM 5 COVERING PRODUCTS FOR RESEARCH AND TESTING AND SITUATIONS WHERE ACCURATE PRICE CALCULATIONS ARE NOT POSSIBLE IF GERMANY INSISTS ON ITS RETENTION.

9. (II-7) AID TO SMALL AND MEDIUM-SIZED BUSINESSES. USDEL SHOULD REPEAT STATEMENT PREVIOUSLY MADE THAT THERE IS NO NEED FOR DEROGATION FROM INSTRUMENT TO COVER ASSISTANCE TO SMALL BUSINESS CONCERNS IN GOVERNMENT PURCHASING. AIM OF THIS NEGOTIATING TACTIC IS TO "SMOKE OUT" INFORMATION ON PRACTICES OF JAPAN, GERMANY AND OTHERS IN THIS AREA.

10. (II-8) OTHER ITEMS (PARAGRAPH 20). U.S. SHOULD SUPPORT SECOND ALTERNATIVE FOR LAST PARAGRAPH SINCE IT CONTAINS ASSURANCES THAT BIDDER WILL AGREE TO ALL TERMS OF TENDER.

11. (II-8) OTHER ITEMS (PARAGRAPH 27). USDEL SHOULD OPT FOR RETENTION THIRD VERSION OF STATEMENT ON BID OPENINGS. EXPRESS REQUIREMENT IN THIRD VERSION FOR DISCLOSURE OF NAMES OF BIDDERS AND AMOUNTS OF BIDS AT POINT OF OPENING IS ESSENTIAL TO INSURE AGAINST LAST MINUTE INSERTION OF BIDS BY NEW BIDDER WHO HAD BEEN INFORMED BY PROCURING AGENCY OF BID AMOUNTS ALREADY RECEIVED. INGERSOLL LIMITED OFFICIAL USE

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